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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MITCHELL FUENTES,

Defendant and Appellant.

H035286

(Santa Clara County
Super. Ct. No. CC955307)

Defendant appeals from the 16-month state prison sentence imposed following his no contest pleas and admissions in Santa Clara Superior Court case number CC955307. We appointed counsel to represent defendant in this court. Appointed counsel has filed an opening brief which states the case and the facts, but raises no specific issues. We notified defendant of his right to submit written argument in his own behalf within 30 days. He has not done so.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we have reviewed the entire record, and we have concluded that there is no arguable issue on appeal. (See also *People v. Kelly* (2006) 40 Cal.4th 106, 124.) Therefore, we will affirm.

PROCEDURAL BACKGROUND

A five-count information filed on November 12, 2009, charged defendant with two felonies, possession of a firearm by a felon (count 1) and possession of a short-barreled shotgun or rifle (count 2), and three misdemeanors, being under the influence of a controlled substance (count 3), possession of controlled substance paraphernalia (count 4), and possession of a hypodermic needle or syringe (count 5). (Pen. Code, §§ 12021, subd. (a)(1), 12020, subd. (a)(1), Health & Saf. Code, §§ 11550, subd. (a), 11364, Bus. & Prof. Code, § 4140.) The information also alleged that defendant had suffered a prior conviction for residential burglary, a strike.

On December 10, 2009, pursuant to a negotiated disposition, defendant pleaded no contest to possession of a short-barreled shotgun or rifle and to the three misdemeanor counts, and admitted the prior strike conviction. He was advised of his constitutional rights and waived them. He was advised of the consequences of his pleas and indicated that he understood them. In exchange for his pleas and admission, defendant was promised that the prosecutor would move to dismiss the remaining felony charge; defendant would not be sentenced to more than 32 months in state prison; and that his attorney would make a *Romero* motion to strike the prior conviction. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) The court indicated that if it granted the *Romero* motion, defendant would be eligible for probation and would be considered for a grant of probation. The plea bargain also included the disposition of a misdemeanor charge of being under the influence of a controlled substance alleged in a separate docket. The court took the prosecutor's motion to dismiss under submission, with the understanding that it would be granted at sentencing. Defendant was referred to the probation department for a full report and recommendation, computation of credits, and victim notification.

Defense counsel filed a written *Romero* motion and the prosecutor filed a written response. On February 11, 2010, the court granted the *Romero* motion and struck the prior strike conviction under Penal Code section 1385, giving as its reasons the antiquity of the strike prior conviction, the fact that the current felony was not a serious or violent one under the Penal Code, and the fact that defendant had improved prospects for the future after completion of his sentence because he was a union painter. However, the court denied probation because it deemed a local sentence inappropriate in defendant's case. The court imposed the mitigated term of 16 months in state prison in light of the facts that defendant did well on his last parole and the current offense did not involve violence or injury.

The court granted defendant 152 days credit for actual time served and 76 days of conduct credit pursuant to Penal Code section 4019, over defense counsel's objection that defendant should get day for day credit under section 4019 since his prior strike conviction had been stricken. The court dismissed count 1 on the prosecutor's previously-made motion. On the felony count, the court imposed a restitution fine of \$200 and imposed but suspended a parole revocation fine in the same amount. (Pen. Code, §§ 1202.4, 1202.45.) The court also imposed a court security fee of \$30, a criminal conviction assessment of \$30, and a criminal justice fee to the City of San Jose of \$129.75. Finally, the court ordered defendant to provide buccal swab samples, prints, blood specimens and /or biological samples pursuant to Penal Code section 296.

On the remaining misdemeanor counts, the court denied probation and imposed concurrent 90 day sentences with 90 days credit for time served. The court imposed a court security fee of \$90, a criminal conviction assessment of \$90, a lab assessment fee of \$50 and a drug program fee of \$150, but it waived the penalty assessments on the two latter fees, as well as attorney fees and the AIDS education fee. In the separate docket, the court denied probation and imposed a concurrent 229 day sentence with 229 days credit for time served.

STATEMENT OF FACTS¹

On September 13, 2009, San Jose police officers went to defendant's home to arrest him on an outstanding bench warrant. Defendant's mother let them into the house and led them to defendant's bedroom. A search of defendant's bedroom yielded a short barreled shotgun, a loaded syringe, three glass smoking pipes and two empty syringes. At the county jail, defendant submitted a blood sample and tested positive for methamphetamine.

DISCUSSION

Pursuant to *Wende, supra*, 25 Cal.3d 436, we reviewed the entire record and requested simultaneous supplemental letter briefs from the parties discussing whether defendant, whose prior serious felony conviction was stricken by the trial court for the purposes of the Three Strikes law, is entitled to receive additional credits under the ameliorative provisions of the January 25, 2010 amendment to Penal Code section 4019, in light of *People v. Jones* (2010) 188 Cal.App.4th 165.² The January 25, 2010 amendments to section 4019 allow some prisoners to earn good conduct and work credits at an accelerated rate of four days credit for every two days actually served. (§ 4019, subd. (f); Stats. 2009-2010, 3d Ex. Sess., Ch. 28, § 50.) Prisoners who have prior serious felony convictions, however, are not eligible to earn credits at the accelerated rate; they continue to earn credits at the pre-January 25, 2010 rate of two days credit for every four actually served. (See former § 4019, subds. (b)-(d).)

Both counsel responded to our request for supplemental briefs. Having reviewed the parties' letter briefs, we conclude that no error occurred, for the following reasons.

¹ This factual summary is drawn from the probation reports.

² Petitions for review have been filed by both the People and the defendant in *People v. Jones, supra*, 188 Cal.App.4th 165 (S187135).

Defendant argues that he is entitled to such credits, despite his prior conviction, because “using a prior conviction to make someone ineligible for additional credits” increases punishment. He reasons that since it increases punishment, the prior conviction must be pleaded and proven by the prosecution, and since it must be pleaded and proven, it may be stricken for the purposes of Penal Code section 4019, just as it may be stricken for the purposes of the Three Strikes law. The Attorney General argues that the Legislature’s decision to exclude persons with prior serious felony convictions from eligibility for the accelerated accrual of conduct and work credits does not increase such persons’ punishment, since they continue to accrue good conduct and work credits at the same rate as they enjoyed before the change in the law. We agree. Put differently, the fact that a statutory scheme for earning credits may *ameliorate* punishment for some, does not necessarily mean that it *increases* punishment for others, at least where the rate at which credits may be earned stays the same as it was before the ameliorative change in the law.

Therefore, the People were not required to plead and prove defendant’s prior serious felony conviction for purposes of Penal Code section 4019, and the court did not need to consider whether to strike the prior conviction for the purpose of making defendant eligible for accelerated accrual of credit under that statute. Since striking the prior conviction under Penal Code section 1385, for the purposes of Three Strikes sentencing, did not erase the prior conviction from defendant’s record (*In re Varnell* (2003) 30 Cal.4th 1132, 1138), the fact of defendant’s prior conviction continued to disqualify defendant from eligibility to earn credits at an accelerated rate under section 4019, as amended on January 25, 2010.

In addition, defendant was adequately informed of his constitutional rights and waived them. He was adequately informed of the consequences of his pleas and admissions. Defendant received the benefit of his plea bargain. As discussed above, no sentencing error occurred. Specifically, the court did not err in concluding that the

ameliorative provisions of amended Penal Code section 4019 do not apply to a person, such as defendant, who “has a prior conviction for a serious felony, as defined in Section 1192.7,” even though the prior conviction has been stricken for the purposes of sentencing in the current case. (Pen. Code, § 4019, subds. (b)(2), (c)(2) & (f).) We conclude that there is no arguable issue on appeal. (*People v. Kelly*, *supra*, 40 Cal.4th at p. 124.)

DISPOSITION

The judgment is affirmed.

McAdams, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.